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# Making the Fair Sentencing Act Retroactive: Just Think of the Savings . . . Clause

Jeff Lazarus

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# MAKING THE FAIR SENTENCING ACT RETROACTIVE: JUST THINK OF THE SAVINGS . . . CLAUSE

JEFF LAZARUS\*

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“Congress . . . intended in the Fair Sentencing Act to repeal and redress the  
wrongs of the older crack sentencing statute that Congress believed had proven itself  
to be arbitrary, irrational, and racially discriminatory.”<sup>1</sup>

## I. INTRODUCTION

The year is 1995. Imagine Andre, who grew up in inner city Cleveland and has  
an eighth grade education. Two years before, and shortly after his eighteenth

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have been working with Mr. Lazarus on litigating these crack cocaine disparity issues in the  
courts, including: Dennis Terez, Melissa Salinas, Amy Cleary, and Christine Sason.

<sup>1</sup> United States v. Blewett, 719 F.3d 482, 486 (6th Cir. 2013); *reh’g en banc granted*,  
2013 U.S. App. LEXIS 15872 (6th Cir. July 11, 2013).

birthday, Andre was arrested two separate times for selling crack cocaine to an undercover officer. He received probation and went back onto the street. In 1995, Andre was arrested for possessing sixty grams of crack cocaine, clearly not an amount for personal use. Due to the amount, the federal prosecutors chose to charge Andre with a federal drug offense.<sup>2</sup> Because he possessed over fifty grams, and because he had two prior drug offenses, Andre faced a sentence of mandatory life in prison.<sup>3</sup> After a short trial, Andre was convicted and sentenced to life in prison, despite having no history of violence in his past or in this offense. Today, Andre is now thirty-nine years old and will die in prison because in the federal system “life” means life without the possibility of parole.<sup>4</sup>

Andre is not unique. There are literally thousands of people serving mandatory life sentences for crack cocaine offenses in federal prison.<sup>5</sup> Approximately eighty-five percent of them are African-American.<sup>6</sup> For decades, defense lawyers have been challenging, without any success, the disproportionate federal sentencing laws for crack cocaine, compared to powder cocaine, as both being irrationally harsh and having an unfair impact on African-Americans.<sup>7</sup>

In 2010, Congress passed and the President signed legislation to “restore fairness” to the federal crack cocaine laws by enacting the Fair Sentencing Act.<sup>8</sup> Were Andre sentenced under the Fair Sentencing Act, he would receive a mandatory minimum sentence of ten years, as opposed to a mandatory life sentence.<sup>9</sup> This legislation, however, did not explicitly state whether it could apply retroactively to those already serving these harsh sentences.<sup>10</sup> As a result, federal courts have refused to grant relief to defendants sentenced prior to the passage of the Fair Sentencing Act,<sup>11</sup> Two narrow exceptions are detailed herein. Thus, despite legislation that the

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<sup>2</sup> 21 U.S.C.A. § 841(a)(1), (b)(1)(A) (West 1995).

<sup>3</sup> *Id.*

<sup>4</sup> See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (Congress abolished parole in federal sentences, meaning that “life” means life without the possibility of release in the federal system.); *Skowronek v. Brennan*, 896 F.2d 264 (7th Cir. 1990).

<sup>5</sup> *Blewett*, 719 F.3d at 484.

<sup>6</sup> *United States v. Doe*, 731 F.3d 518, 520-21 (6th Cir. 2013) (citing *Kimbrough v. United States*, 552 U.S. 85, 98 (2007)).

<sup>7</sup> See, e.g., *United States v. Williams*, 962 F.2d 1218, 1227 (6th Cir. 1992); *United States v. Pickett*, 941 F.2d 411, 418 (6th Cir. 1991); *United States v. Galloway*, 951 F.2d 64, 66 (5th Cir. 1992); *United States v. Lawrence*, 951 F.2d 751, 753-56 (7th Cir. 1991); *United States v. Thomas*, 900 F.2d 37, 39-40 (4th Cir. 1990); *United States v. Cyrus*, 890 F.2d 1245, 1248 (D.C. Cir. 1989).

<sup>8</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

<sup>9</sup> 21 U.S.C.A. § 841(a)(1), (b)(1)(B) (West 2013).

<sup>10</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

<sup>11</sup> *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir. 2010); *United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir. 2010); *United States v. Brewer*, 624 F.3d 900, 909 n.7 (8th Cir. 2010); *United States v. Lewis*, 625 F.3d 1224, 1228 (10th Cir. 2010); *United States v. Reevey*, 631 F.3d 110, 115 (3d Cir. 2010); *United States v. Diaz*, 627 F.3d 930, 931 (2d Cir. 2010); *United States v. Doggins*, 633 F.3d 379, 384 (5th Cir. 2011); *United States v. Baptist*,

old sentencing scheme has been declared to be wrong and unfair, Andre must still languish in prison under the old penalties for the rest of his life.

Such a result is unjust and unfair. This article advocates for the retroactive application of the Fair Sentencing Act. Part II of this Article will detail the history of the federal crack cocaine sentencing laws, from 1986 through the passage of the Fair Sentencing Act. Part III will detail the recent cases dealing with attempts at retroactivity in the lower courts. Part IV outlines the Supreme Court's holding in *United States v. Dorsey*,<sup>12</sup> which was a ground-breaking step towards the FSA's retroactive effect. Part V offers arguments in support of retroactivity. Part VI offers legal challenges in which inmates can seek relief in the courts. In Part VII, we will leave the courtroom and offer policy reasons why the retroactivity of the Fair Sentencing Act does not just benefit those serving crack cocaine sentences, but is a benefit to the public as a whole.<sup>13</sup>

## II. THE HISTORY OF THE FEDERAL CRACK COCAINE SENTENCING LAWS

In 1986, Congress passed the Anti-Drug Abuse Act,<sup>14</sup> which set forth federal laws regarding illegal drugs. The statute delineated specific drugs, and set forth penalties relative to each drug and amounts.<sup>15</sup> The statute created "mandatory minimum" sentences—sentencing floors—which a federal judge cannot go below unless narrow factual circumstances are present.<sup>16</sup> Generally, the statute set drug quantity thresholds, which invoked no mandatory minimum,<sup>17</sup> a five-year mandatory minimum,<sup>18</sup> or a ten-year mandatory minimum.<sup>19</sup> The five-year mandatory minimum could be escalated to ten if the defendant had a prior drug felony.<sup>20</sup> The ten-year mandatory minimum rose to twenty years with a prior drug felony, and mandatory life with two prior drug felonies.<sup>21</sup>

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646 F.3d 1225, 1226-28 (9th Cir. 2011); *United States v. Bullard*, 645 F.3d 237, 248-49 (4th Cir. 2011); *United States v. Goncalves*, 642 F.3d 245, 252-55 (1st Cir. 2011); *United States v. Powell*, 652 F.3d 702, 710 (7th Cir. 2011).

<sup>12</sup> *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

<sup>13</sup> For the sake of brevity, the Fair Sentencing Act will henceforth be referred to as the FSA.

<sup>14</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

<sup>15</sup> 21 U.S.C.A. § 841(b)(1) (West 1986).

<sup>16</sup> 18 U.S.C.A. § 3553(e) (West 2010); 28 U.S.C. § 994(a) (2006); U.S. SENTENCING GUIDELINES MANUAL §§ 5G1.1, 5K1.1 (2004); *Neal v. United States*, 516 U.S. 284, 289-90 (1996).

<sup>17</sup> 21 U.S.C.A. § 841(b)(1)(C) (West 2009) (current version at 21 U.S.C.A. § 841(b)(1)(C) (West 2010)).

<sup>18</sup> 21 U.S.C.A. § 841(b)(1)(B) (West 2009) (current version at 21 U.S.C.A. § 841(b)(1)(B) (West 2010)).

<sup>19</sup> 21 U.S.C.A. § 841(b)(1)(A) (West 2009) (current version at 21 U.S.C.A. § 841(b)(1)(A) (West 2010)).

<sup>20</sup> 21 U.S.C.A. § 841(b)(1)(B) (West 2009) (current version at 21 U.S.C.A. § 841(b)(1)(B) (West 2010)).

<sup>21</sup> *Id.*

Crack cocaine and powder cocaine were separately dealt with in the Anti-Drug Abuse statute.<sup>22</sup> Some courts have rejected any chemical difference between crack and powder cocaine, and have concluded the law should not treat the two differently.<sup>23</sup> Cases involving five hundred grams of powder cocaine invoked the five-year mandatory minimum, whereas possession of only five grams of crack cocaine triggered the same mandatory penalty.<sup>24</sup> Furthermore, a case involving five thousand grams of powder cocaine triggered the ten-year mandatory minimum, but a case involving fifty grams of crack cocaine had the same penalty.<sup>25</sup> Thus, any defendant with fifty grams of crack cocaine and two prior drug felonies would be sentenced to mandatory life in prison.<sup>26</sup>

The United States Sentencing Commission oversees the enactment and maintenance of federal sentencing guidelines, which aim to promote “certainty and fairness in sentencing and reducing unwarranted sentence disparities.”<sup>27</sup> In response to the Anti-Drug Abuse statute, the Sentencing Commission set offense levels to reflect the mandatory minimums set forth in the statute.<sup>28</sup> The Supreme Court has held that this was done because the Sentencing Commission wanted to “keep similar drug-trafficking sentences proportional.”<sup>29</sup> Thus, since the passage of the Anti-Drug Abuse statute, proportionality in sentencing for drug crimes has always been the paramount concern.

Throughout the 1990s and 2000s, Congress’s statutory choice to treat crack cocaine so harshly, as compared to powder cocaine, received significant challenge and criticism. Allowing a mandatory minimum for crack cocaine quantities that were one percent the amount to trigger the same penalties for powder cocaine came under scrutiny. This came to be referred as the “one hundred to one ratio.”<sup>30</sup> For example, consider two defendants, both with a prior drug felony. One defendant has four hundred and ninety-nine grams of powder cocaine, but will not receive any mandatory minimum.<sup>31</sup> Another defendant has six grams of crack cocaine, and as a

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<sup>22</sup> 21 U.S.C.A. § 841 (b)(1)(A), (b)(1)(B) (West 2009) (current versions at 21 U.S.C.A. § 841 (b)(1)(A), (b)(1)(B) (West 2010)).

<sup>23</sup> See *United States v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa, 2009) (“Special Report to Congress: Cocaine and Federal Sentencing Policy (April 1997) . . . strongly suggests that the distinctions between the two controlled substances are artificial, at best. . . . [T]he prosecution offered no argument or logical reason why crack cocaine and powder cocaine should be treated differently, on the basis of the controlled substances themselves.”).

<sup>24</sup> 21 U.S.C.A. § 841 (b)(1)(B) (West 2009) (current version at 21 U.S.C.A. § 841 (b)(1)(B) (West 2010)).

<sup>25</sup> 21 U.S.C.A. § 841 (b)(1)(A) (West 2009) (current version at 21 U.S.C.A. § 841 (b)(1)(A) (West 2010)).

<sup>26</sup> *Id.*

<sup>27</sup> 28 U.S.C. § 994(f) (2006).

<sup>28</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2327 (2012).

<sup>29</sup> *Id.* at 2328; *Kimbrough v. United States*, 552 U.S. 85, 97 (2007).

<sup>30</sup> See, e.g., *Kimbrough*, 552 U.S. at 97; *United States v. Doe*, 2013 WL 4792135, at \*1 (6th Cir. Aug. 27, 2013).

<sup>31</sup> 21 U.S.C. § 841 (b)(1)(C) (West 2009) (current version at 21 U.S.C. § 841 (b)(1)(C) (West 2010)).

result will be subject to a mandatory minimum of ten years.<sup>32</sup> Such a penalty structure did not achieve the Sentencing Commission's goal of uniformity and proportionality in federal sentencing.<sup>33</sup> Furthermore, there was significant racial disparity as a result of these disproportionate penalties.

As a result of these crack cocaine mandatory minimum penalties, thousands of defendants (an overwhelming majority of which are African-American) were convicted for crack offenses and are currently serving mandatory sentences of twenty years or life.<sup>34</sup> The racially discriminatory impact of the crack cocaine sentencing scheme showed that nearly one hundred percent of all crack defendants were non-white.<sup>35</sup> In fact, from 1988 to 1995, federal prosecutors prosecuted no whites under the crack provisions in seventeen states, including major cities such as: Boston, Denver, Chicago, Miami, Dallas, and Los Angeles.<sup>36</sup> In 2010, the Chairman of the Judiciary Committee, Senator Patrick Leahy, called this disparity in sentencing "one of the most notorious symbols of racial discrimination in the modern criminal justice system."<sup>37</sup>

Given this unwarranted disparity, defense attorneys challenged the sentencing disparities between the powder and crack cocaine penalties throughout the 1990s and 2000s.<sup>38</sup> Twenty-one years after the passage of the Anti-Drug Abuse statute, the Sentencing Commission passed retroactive guideline amendments.<sup>39</sup> These retroactive amendments allowed defendants sentenced for crack cocaine offenses to receive a two-level reduction in their base offense levels.<sup>40</sup> While these amendments

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<sup>32</sup> 21 U.S.C. § 841 (b)(1)(A) (West 2009) (current version at 21 U.S.C. § 841 (b)(1)(A) (West 2010)).

<sup>33</sup> *Dorsey*, 132 S. Ct. at 2328 (citing *Kimbrough*, 552 U.S. at 97-98; U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 53-54 (Oct. 2011)).

<sup>34</sup> U.S. SENT'G COMM'N, STATEMENT OF JUDGE PATTY SARIS TO THE UNITED STATES SENATE JUDICIARY COMMITTEE: REEVALUATING THE EFFECTIVENESS OF FEDERAL MANDATORY MINIMUM SENTENCES 3 (Sept. 18, 2013) [hereinafter U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Submissions/20130918\\_SJC\\_Mandatory\\_Minimums.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/20130918_SJC_Mandatory_Minimums.pdf).

<sup>35</sup> U.S. SENT'G COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.34 (2011) [hereinafter U.S. SENT'G COMM'N, 2011 SOURCEBOOK] (94% non-white); LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER RACE & JUST. 375, 386-88 & n.68 (2011).

<sup>36</sup> Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, [http://articles.latimes.com/1995-05-21/news/mn-4468\\_1\\_crack-cocaine](http://articles.latimes.com/1995-05-21/news/mn-4468_1_crack-cocaine) ; United States v. Blewett, 719 F.3d 482, 487 (6th Cir. 2013).

<sup>37</sup> 156 CONG. REC. S1683 (daily ed. Mar. 17, 2010).

<sup>38</sup> See *supra* text accompanying note 7.

<sup>39</sup> See U.S. SENTENCING GUIDELINES AMENDMENT 706 (effective Nov. 1, 2007).

<sup>40</sup> *Id.*

allowed defendants to receive reductions from their sentencing guideline ranges, all mandatory minimums sentences were unaffected and remained in place.<sup>41</sup>

On August 3, 2010, Congress passed, and the President signed, the Fair Sentencing Act.<sup>42</sup> The FSA increased the threshold amounts of crack cocaine which trigger the respective mandatory minimums.<sup>43</sup> To invoke the five-year mandatory minimum, a defendant must possess twenty-eight grams, raised from five grams.<sup>44</sup> For the ten-year mandatory minimum, a defendant must possess two hundred and eighty grams, raised from fifty grams.<sup>45</sup> The FSA also directed the Sentencing Commission to pass amendments to the Sentencing Guidelines to reflect the statutory changes.<sup>46</sup> Soon thereafter, the Sentencing Commission passed additional retroactive guideline amendments, lowering base offense levels.<sup>47</sup>

When the Sentencing Commission passes retroactive guideline amendments, those whose sentences are affected by the amendment may seek a sentence reduction.<sup>48</sup> Title 18 United States Code § 3582(c)(2) does not provide for a full resentencing but allows the defendants sentenced to be reduced, substituting only the retroactive guideline amendment.<sup>49</sup> At the time Amendment 750 went into effect, there were nearly thirty thousand federal inmates serving sentences for crack cocaine offenses, approximately fifteen percent of the entire federal prison population.<sup>50</sup> Most of these thirty thousand inmates believed the passage of Amendment 750 would provide them with some relief.<sup>51</sup> Unfortunately, only those defendants who were sentenced above their respective mandatory minimums were able to get any reduction.<sup>52</sup>

### III. ALL DEFENDANTS SERVING SENTENCES UNDER THE PRE-FSA MANDATORY MINIMUMS ARE DENIED RELIEF

Remember Andre; serving mandatory life for possessing sixty grams of crack? If he were arrested in September of 2010 for the same offense, the FSA would have

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<sup>41</sup> *United States v. Hameed*, 614 F.3d 259 (6th Cir. 2010); *United States v. Johnson*, 564 F.3d 419 (6th Cir. 2009).

<sup>42</sup> Fair Sentencing Act, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Fair Sentencing Act, Pub. L. No. 111-220, § 8, 124 Stat. 2372 (2010).

<sup>47</sup> U.S. SENTENCING GUIDELINES AMENDMENT 750 (effective Nov. 1, 2011).

<sup>48</sup> 18 U.S.C.A. § 3582(c)(2) (West 2002).

<sup>49</sup> *Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010); U.S. SENTENCING GUIDELINES MANUAL § 1B1.10(b) (2004).

<sup>50</sup> *United States v. Blewett*, 719 F.3d 482, 485 (6th Cir. 2013).

<sup>51</sup> U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 9.

<sup>52</sup> U.S. SENT'G COMM'N, PRELIMINARY CRACK RETROACTIVITY DATA REPORT tbl.9 (July 2013) [hereinafter U.S. SENT'G COMM'N, PRELIMINARY DATA], *available at* [http://www.ussc.gov/Research\\_and\\_Statistics/Federal\\_Sentencing\\_Statistics/FSA\\_Amendments/2013-07\\_USSC\\_Prelim\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/Research_and_Statistics/Federal_Sentencing_Statistics/FSA_Amendments/2013-07_USSC_Prelim_Crack_Retro_Data_Report_FSA.pdf).

subjected him to a five-year mandatory minimum, and a ten-year mandatory minimum because of his prior drug felony.<sup>53</sup> Thus, if the FSA is made retroactive, Andre would receive a mandatory ten years, not the mandatory life sentence he is currently serving.

Unsurprisingly, after the passage of the FSA, numerous defendants who languished in prison under the, now deleted, pre-FSA statutory penalties sought relief.<sup>54</sup> Waves of motions were filed challenging the validity of their sentences, arguing their pre-FSA mandatory minimum sentences were unconstitutional or improper.<sup>55</sup> Each and every circuit court denied relief.<sup>56</sup> All eleven circuit courts relied on the “general savings statute,”<sup>57</sup> 1 U.S.C. § 109, which states:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

All circuits concluded that because the FSA does not contain any express statement of retroactivity, and without any express statement from Congress, the court refused to allow any retroactive effect.<sup>58</sup> Thus, despite these drastic changes to the crack cocaine statutory penalties, defendants were unable to pierce their pre-FSA statutory mandatory minimums. In fact, a thorough review of the relevant cases has only revealed one case where the defendant was able to receive a sentence reduction below the pre-FSA mandatory minimums. In *United States v. Miller*,<sup>59</sup> the defendant was twenty-seven years old when convicted in 1989 of a drug trafficking conspiracy<sup>60</sup> and firearm offenses.<sup>61</sup> He was found to be a career offender, which placed his sentencing guideline range at three hundred and sixty months to life; however, because of his multiple prior felony drug convictions, he was statutorily-mandated to receive a life sentence.<sup>62</sup> The district court sentenced Miller to a life sentence, with a five-year consecutive sentence for the firearm offenses.<sup>63</sup>

Three days after the passage of the FSA, the district court granted Miller a sentence reduction to two hundred and sixty-two months, allowing him to be immediately released. The district court recognized that Miller’s career offender

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<sup>53</sup> 21 U.S.C.A. § 841(b)(1)(B) (West 2010).

<sup>54</sup> U.S. SENT’G COMM’N, PRELIMINARY DATA, *supra* note 52, at tbl.1.

<sup>55</sup> *Id.*

<sup>56</sup> *See supra* text accompanying note 11.

<sup>57</sup> Because the case law also refers to the general savings statute as the general savings clause, the two terms will be used interchangeably.

<sup>58</sup> *See supra* text accompanying note 11.

<sup>59</sup> *United States v. Miller*, No. 4:89-CR-120, 2010 WL 3119768 (D. Minn. Aug. 6, 2010).

<sup>60</sup> 21 U.S.C.A. §§ 841(a)(1), 846 (West 2010).

<sup>61</sup> *Miller*, 2010 WL 3119768, at \*1.

<sup>62</sup> *Id.*; 21 U.S.C.A. § 841(b)(1)(A) (West 2010).

<sup>63</sup> *Miller*, 2010 WL 3119768, at \*1.



status and statutorily mandated life sentence under the pre-FSA penalties prevented him from receiving a sentencing reduction.<sup>64</sup> However the district court granted Miller a sentencing reduction anyway, recognizing, “[t]his case, however, represents a singular and unique exception.”<sup>65</sup>

In support of its order, the district court referenced the FSA, by stating, “[at] the original sentence, [the Court] did not consider the crack/powder disparity—a disparity that Congress and the sentencing commission have repeatedly attempted to resolve.”<sup>66</sup> The court noted that under the 2010 statutes and guidelines, Miller would not have received a life sentence, but would have been sentenced in the range of two hundred and ten to two hundred and sixty-two months.<sup>67</sup> The district court also stated that Miller had served more than twenty years already, and that “[s]uch a sentence absolutely and adequately reflects the seriousness of the offense and provides just punishment. In addition, nothing in the record suggests defendant represents a danger to the community if released.”<sup>68</sup> Thus, while the district court never used the term “retroactive,” the district court did in fact retroactively apply the FSA to Miller’s 1989 sentence. The government did not appeal Miller’s sentence reduction.<sup>69</sup>

With all due respect to the *Miller* Court, while the district court hinged its decision on Miller being “a singular and unique exception,”<sup>70</sup> there is nothing unique or singular about his case. There are thousands of defendants serving sentences just like Miller’s throughout the country.<sup>71</sup> His receipt of a sentence reduction due to the retroactive application of the FSA stands alone. In the wake of the passage of the FSA, no other defendants have incurred the same benefit as Miller—the retroactive application of the FSA. Countless numbers of defendants were denied any relief and remain incarcerated, serving sentences based solely on the pre-FSA statutory penalties.<sup>72</sup>

Just as the dust began to settle, and all circuit courts had ruled the FSA was not retroactive, a factual anomaly presented itself. The issue arose: What about defendants who pled guilty or were convicted prior to the passage of the FSA, but whose sentencing hearing occurred after the FSA went into effect? The defendants in these cases have been called “pipeline” or “straddle” cases.<sup>73</sup> A circuit split arose on

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at \*1.

<sup>71</sup> U.S. SENT’G COMM’N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 9-10.

<sup>72</sup> *Id.* at 10 (If the FSA were retroactive, 8,829 inmates would be eligible for a reduction, with an average reduction of 53 months per inmate. Also, 87.7% of those are eligible are African-American.).

<sup>73</sup> *United States v. McNair*, No. 10-5901, 2012 WL 987753 (6th Cir. Mar. 23, 2012); *United States v. Gillam*, 753 F. Supp. 2d 683 (W.D. Mich. 2010).

how to handle these pipeline cases. The First Circuit in *United States v. Douglas*,<sup>74</sup> found the FSA could apply to these pipeline defendants. The First Circuit expressed its awareness of the general savings statute, and the presumption against retroactivity, but found, “the savings statute [1 U.S.C. § 109] may be overridden ‘either by express declaration or necessary implication.’”<sup>75</sup> The First Circuit ordered retroactive application of the FSA because it was a “fair result.”<sup>76</sup> Thus, the First Circuit found the FSA could be retroactively applied to pipeline defendants because such a result was only fair, thereby overcoming the presumption against retroactivity.

The Third Circuit issued a similar holding in *United States v. Dixon*.<sup>77</sup> The Third Circuit also found the FSA to apply to pipeline defendants as, “[t]he language of the Act reveals Congress’s intent that courts no longer be forced to impose mandatory minimums sentences that are both indefensible and discriminatory.”<sup>78</sup> The *Dixon* Court refused to follow the presumption against retroactivity, finding, “the Saving Statute cannot control when preserving repealed penalties would plainly conflict with the intent of Congress as expressed in a subsequent statute.”<sup>79</sup> The Court was also guided by the overarching principle of fairness, stating their holding, “comports with its stated purpose to restore fairness to federal cocaine sentencing.”<sup>80</sup>

The Eleventh Circuit also allowed retroactive application of the FSA to pipeline defendants in *United States v. Rojas*,<sup>81</sup> but the Court *en banc* later vacated the holding.<sup>82</sup>

The Seventh Circuit went against *Douglas* and *Dixon*, holding the FSA could not be retroactively applied to pipeline defendants.<sup>83</sup> The Court began its opinion stating the FSA should be more aptly named “The Not Quite as Fair as it could be Sentencing Act of 2010.”<sup>84</sup> The Court, however, refused to “read in by implication anything not obvious in the text of the FSA. We believe that if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA.”<sup>85</sup> Thus, relying solely on the text of the FSA, the Court denied any retroactive effect to pipeline defendants.

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<sup>74</sup> *United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011).

<sup>75</sup> *Id.* at 43 (quoting *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908)).

<sup>76</sup> *Id.* at 44 (citing *United States v. Goncalves*, 642 F.3d 245, 244-45 (1st Cir. 2011)).

<sup>77</sup> *United States v. Dixon*, 648 F.3d 195, 199 (3d Cir. 2011).

<sup>78</sup> *Id.* at 196.

<sup>79</sup> *Id.* at 199.

<sup>80</sup> *Id.* at 203.

<sup>81</sup> *United States v. Rojas*, 645 F.3d 1234 (11th Cir. 2011).

<sup>82</sup> *United States v. Hudson*, 659 F.3d 1056 (11th Cir. 2011).

<sup>83</sup> *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011).

<sup>84</sup> *Id.* at 338.

<sup>85</sup> *Id.* at 339-40.

Given this split among the circuits, the Supreme Court granted a *writ of certiorari* in *United States v. Dorsey*,<sup>86</sup> to determine whether the FSA could be retroactively applied to pipeline defendants.

#### IV. THE SUPREME COURT GRANTS RETROACTIVE RELIEF TO PIPELINE DEFENDANTS

In *Dorsey*, the Supreme Court held the mandatory minimums statutory penalties in the FSA apply to defendants sentenced after the FSA's enactment, regardless of when they committed the offense.<sup>87</sup> The Court set forth six considerations, which all taken together, supported its holding.<sup>88</sup>

First, the Court held the saving statute, 1 U.S.C. § 109, does not require an "express statement" for a criminal statute to apply retroactively, as long as the "plain import" or "fair implication" of the statute so provides.<sup>89</sup> The Court acknowledged the savings statute purported to require that subsequent Congresses expressly state whether ameliorative criminal statutes would apply to offenses that occurred prior to the enactment of the statute, but noted that "statutes enacted by one Congress cannot bind a later Congress."<sup>90</sup> Thus, the Court held the saving statute is not a bar to applicability, as long as courts "assure themselves that ordinary interpretive considerations point clearly in that direction."<sup>91</sup>

Second, the Court observed that the Sentencing Reform Act (SRA) sets forth a different background sentencing principle that defendants generally do get the benefit of ameliorative sentencing amendments.<sup>92</sup> It noted that, pursuant to 18 U.S.C. § 3553(a)(4)(A)(ii), courts must apply the Guidelines that are in effect on the date of the initial sentencing.<sup>93</sup> Thus, "when the Commission adopts new, lower Guideline amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter."<sup>94</sup> The Court "assume[d] that Congress was aware of this different background sentencing principle," and interpreted the FSA to be consistent with such principles.<sup>95</sup>

Third, the Court explained the language in the FSA implies that Congress intended to follow the SRA's background principle allowing for defendants to benefit from ameliorative sentencing amendments.<sup>96</sup> In the FSA, Congress required the Sentencing Commission to promulgate "as soon as practicable" (not later than

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<sup>86</sup> *Dorsey v. United States*, 132 S. Ct. 2321 (2012).

<sup>87</sup> *Id.* at 2335.

<sup>88</sup> *Id.* at 2331.

<sup>89</sup> *Id.* at 2332.

<sup>90</sup> *Id.* at 2331.

<sup>91</sup> *Id.* at 2332.

<sup>92</sup> *Id.* at 2331.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 2332.

ninety days after August 3, 2010), sentencing guidelines amendments in order to “achieve consistency with other guideline provisions and applicable law.”<sup>97</sup>

Fourth, the Court observed that by denying relief to defendants like Dorsey, thereby applying the pre-FSA mandatory minimums to post-FSA sentencing, this result would create “disparities of a kind that Congress enacted the [SRA] and the [FSA] to prevent.”<sup>98</sup> Two individuals who were sentenced at the same time, at the same place, and even by the same judge would receive substantially different sentences based only on the date of their conduct.<sup>99</sup> In addition, applying pre-FSA mandatory minimums at post-FSA sentencing would require courts to impose pre-Act sentences after “Congress had specifically found such a sentence was unfairly long.”<sup>100</sup>

Fifth, if the FSA were not applied, instead of restoring fairness to federal cocaine sentencing, the result would make sentences even more disproportionate.<sup>101</sup> “It would create new anomalies—new sets of disproportionate sentences—not previously present. This is because sentencing courts would be required to apply the [post-FSA] sentencing guidelines in conjunction with the [pre-FSA] mandatory minimums . . . This would result in a sentencing ‘cliff’ wherever a defendant was subject to a [pre-FSA] mandatory minimum.”<sup>102</sup> Such a sentencing scheme would also result in sentencing valleys where defendants with substantially different conduct would be subject to the same sentence.<sup>103</sup>

Sixth, the Court explained there were no strong countervailing considerations against its holding.<sup>104</sup> Taking these six considerations together, the Court concluded that Congress intended the FSA’s more lenient mandatory minimums to apply to post-FSA sentencing of pre-FSA offenders.<sup>105</sup>

In total, the *Dorsey* Court found the savings statute did not bar relief to pipeline defendants because the FSA’s “language, structure, and basic objectives,” including the “plain import” or “fair implication” intended the new mandatory minimums to apply.<sup>106</sup> The Court rested its conclusion “primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing. . . . [A] contrary determination would (in respect to relevant groups of drug offenders) produce sentences less uniform and more disproportionate than if Congress had not enacted

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<sup>97</sup> *Id.* (quoting Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8(2), 124 Stat. 2372, 2374 (2010)).

<sup>98</sup> *Id.* at 2333.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2334.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2337-38.

<sup>104</sup> *Id.* at 2335.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

the Fair Sentencing Act at all.”<sup>107</sup> The Court also recognized that application of the new mandatory minimums to pre-FSA offenders sentenced after the FSA’s effective date would create a new set of disparities, which would contravene the goals of federal sentencing.<sup>108</sup>

V. *DORSEY* BROKE NEW GROUND THEREBY ALLOWING DEFENDANTS TO RECEIVE  
RETROACTIVE APPLICATION OF THE FSA

The Supreme Court’s holding in *Dorsey* made clear that defendants whose offense pre-dated the FSA, but had not yet been sentenced, could receive retroactive application of the FSA. Consistent with the Court’s holding in *Dorsey*, all defendants sentenced before August 3, 2010, should also receive the application of the FSA’s new mandatory minimum statutory penalties. The Court’s rationale in *Dorsey* and the Court’s six considerations, apply with equal force to defendants sentenced prior to the passage of the FSA. Applying these same six considerations (for the sake of brevity, they have been condensed to five) from *Dorsey* to those sentenced prior to the FSA, requires retroactive application of the FSA.

First, *Dorsey* makes clear there is no “express statement” of retroactivity found in the FSA.<sup>109</sup> This does not prevent retroactivity, but instead allowed the *Dorsey* Court to look at the “plain import” and “fair implication” of the FSA.<sup>110</sup> In doing so, the Supreme Court concluded that by enacting the FSA, “Congress intended the [Act’s] new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders.”<sup>111</sup> Thus, even though the legislation made no mention of retroactivity, either for or against it, the Court was able to infer retroactivity to pipeline defendants by looking at the FSA’s fair implication. In doing so, the Court relied on FSA’s express purpose, which was to “restore fairness to Federal cocaine sentencing.”<sup>112</sup> Because there cannot be limited, or partial, retroactivity of a statute,<sup>113</sup> if pipeline defendants can receive retroactive application of the FSA, then those sentenced prior to the FSA’s passage must receive retroactive application as well. If courts are to be true to the Supreme Court’s holding in *Dorsey*, then the “plain import” and “fair implication” of the FSA is application to all defendants who are serving sentences for crack cocaine offenses. This is the only plausible and rational way to follow Congress’s will—to *restore* fairness in crack cocaine sentencing.

Second, the *Dorsey* Court found that a “background principle” of federal sentencing supported retroactive application of the FSA.<sup>114</sup> In *Dorsey*, the Court was not faced with sentence reduction motions,<sup>115</sup> collateral attacks or post-conviction

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<sup>107</sup> *Id.* at 2326.

<sup>108</sup> *Id.* at 2335.

<sup>109</sup> *Id.* at 2331.

<sup>110</sup> *Id.* at 2335.

<sup>111</sup> *Id.*

<sup>112</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, pmbl., 124 Stat. 2372, 2372 (2010).

<sup>113</sup> *United States v. Holcomb*, 657 F.3d 445, 446 (7th Cir. 2011).

<sup>114</sup> *Dorsey*, 132 S. Ct. at 2332.

<sup>115</sup> 18 U.S.C.A. § 3582(c)(2) (West 2002).

challenges<sup>116</sup> to a defendant's sentence, but the issue was under which statutory penalties pipeline defendants should be subject to at their initial sentencing.<sup>117</sup> The provision considered in *Dorsey*—18 U.S.C. § 3553(a)(4)(A)(ii)—provides for retroactive application of the sentencing Guidelines not expressly, but through a general command the sentencing court apply the Guidelines “in effect at the time of sentencing.”<sup>118</sup> In some cases, this principle leads to the retroactive application of the Guidelines to conduct that pre-dated the new law.<sup>119</sup> In post-sentencing proceedings, most specifically sentence reduction motions, however, there is a different statute at issue—18 U.S.C. § 3582(c)(2)—which in contrast to § 3553(a)(4)(A)(ii), expressly provides retroactive sentencing amendments. Thus, the retroactive application of the FSA is not merely a “background principle” in these statutory provisions as it was in *Dorsey*, but is plainly in the foreground.

Third, *Dorsey* relied heavily on the need for consistency between the sentencing guidelines and the FSA, and such need supports retroactivity. The Court stated the FSA expressly directed there be “consistency” between the guidelines and “applicable law,” including the FSA’s statutory amendments.<sup>120</sup> This directive was so important that Congress granted “emergency authority” to the Sentencing Commission and directed them to enact retroactive sentencing guidelines amendments reflecting the statutory changes in the FSA.<sup>121</sup> The “fair implication” of this command for consistency is that Congress wanted the new sentencing guidelines to comport with the new statute and vice versa. This consideration was also detailed by the First Circuit in *Douglas*, in which the Court stated, “[i]t seems unrealistic to suppose that Congress strongly desired to put the [new] guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted eighteen to one mandatory minimums.”<sup>122</sup> It is irrational to assume that Congress gave the Sentencing Commission discretion to make the new sentencing guidelines retroactive, but did not want the same for the FSA’s mandatory minimums, with which the new sentencing guidelines were to be consistent. Congress’s strong desire for consistency, and its directive to the Sentencing Commission, fairly implies that the statute was to go wherever the guidelines went.

Fourth, as in *Dorsey*, continuing to apply the pre-FSA mandatory minimums to sentence reduction motions, and denying retroactivity would create the same kind of disparity Congress enacted the SRA and the FSA to prevent. Both the SRA and the FSA were enacted to prevent disparities in sentencing; in fact, the FSA’s express purpose was to restore fairness.<sup>123</sup> Denying retroactivity of the FSA would not only

<sup>116</sup> Such as a habeas corpus motion under 28 U.S.C. § 2255 (2006).

<sup>117</sup> *Dorsey*, 132 S. Ct. at 2330.

<sup>118</sup> *Id.* at 2332.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8(2), 124 Stat. 2372, 2374 (2010)).

<sup>121</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372, 2374 (2010).

<sup>122</sup> *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011).

<sup>123</sup> 18 U.S.C.A. § 3553(a)(6) (West 2010); Fair Sentencing Act of 2010, Pub. L. No. 111-220, pmbll., 124 Stat. 2372, 2372 (2010)).

fail to achieve consistency, but would create greater inconsistency in federal sentencing. Consider this hypothetical: Bruce is arrested on July 1, 2010, he immediately pleads guilty and is sentenced on August 1, 2010. Because Bruce had fifty-five grams of crack cocaine, he is subject to the mandatory minimum of ten years, and because he had two prior drug felonies, Bruce is sentenced to mandatory life in prison.<sup>124</sup> Now, consider Lou, who is arrested on the same day, with the same amount of crack, and also has two prior drug felonies. Lou initially wanted to go to trial, and delayed resolution of his case for six weeks. Then, on August 15, 2010, Lou pleads guilty and is sentenced. Because his conviction and sentencing occurred after the FSA, however, he will only be subject to the five-year mandatory minimum, and with his prior convictions, Lou will be subject to the ten-year mandatory minimum.<sup>125</sup> Thus, two identical defendants could receive extremely disparate sentences. This disparity between the sentences of Bruce and Lou is precisely the sort of disparity that Congress enacted the FSA to prevent; the elimination of such a disparity was central to the rationale underlying *Dorsey*.

A similar point was detailed by Chief Judge Easterbrook in his decision to deny rehearing *en banc* in *United States v. Holcomb*.<sup>126</sup> Chief Judge Easterbrook noted that Attorney General Holder issued a Memorandum to all federal prosecutors on July 15, 2011, which directed them to take the position that the FSA applied to all cases in which a sentence was imposed on or after August 3, 2010.<sup>127</sup> As Chief Judge Easterbrook explained, “the Attorney General has concluded that the 2010 Act is partially retroactive.”<sup>128</sup> He further explained that “the Supreme Court has never held any change in a criminal penalty to be partially retroactive.”<sup>129</sup> The choice has always been binary: retroactive or prospective.”<sup>130</sup> “If the FSA is retroactive, then it applies to all pending cases no matter how far they have got in the judicial system; if it is not retroactive, then it applies only to crimes committed on or after August 3, 2010. Nothing depends on the sentencing date, which reflects how long it took to catch a criminal, and the state of the district judge’s calendar, rather than principles of deterrence or desert.”<sup>131</sup> Chief Judge Easterbrook observed that selecting an effective date for new legislation can be arbitrary and, he explained the unfairness of partial retroactivity as follows:

[W]hat’s fair about condemning someone sentenced on August 2 to more time in prison than a person sentenced the next day, even though they committed their crimes on the same date (and may have been coconspirators)? Suppose comrades in crime distribute cocaine in mid-2009 and are caught promptly. One confesses, pleads guilty, and testifies

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<sup>124</sup> 21 U.S.C.A. § 841 (b)(1)(A)(viii) (West 2010).

<sup>125</sup> 21 U.S.C.A. § 841 (b)(1)(B)(viii) (West 2010).

<sup>126</sup> *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

<sup>127</sup> *Id.* at 445.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 446.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 446-47.

at the trial of the other, who fights tooth and nail and falsely denies culpability. The first is sentenced on August 1, 2010, the second on September 1. How would it be “fair” (or even conscionable) to give the lower sentence to the person who refused to accept responsibility for his crimes, just because by dragging out the process that person was sentenced after August 2?<sup>132</sup>

Fifth, the Court in *Dorsey*, found no sufficiently strong countervailing considerations to deny retroactive relief to the pipeline defendants.<sup>133</sup> Similarly, there are no such considerations here. An argument against retroactivity would be preserving the finality of judgments. Courts are reluctant to re-open cases which have been finalized for years.<sup>134</sup> The law, however, provides defendants with a statutory remedy to reduce their sentences, if, and only if, their sentencing guidelines have changed.<sup>135</sup> This narrow, but defined remedy, is available to defendants, and has been provided by Congress. Thus Congress, in passing § 3582(c)(2), has held that preserving the finality of judgments should not be the overriding concern. In fact, the Supreme Court has noted that sentence reduction motions, § 3582(c)(2), “represent[] a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.”<sup>136</sup>

Thus, all the reasons the Supreme Court relied upon in *Dorsey*, and allowing retroactive application of the FSA to pipeline defendants, also equally apply to those currently serving sentences under the pre-FSA crack cocaine mandatory minimums.

There is one additional principle of statutory construction in support of retroactivity, which was not addressed by the *Dorsey* Court. Before passing the FSA, Congress was faced with a prior version of the FSA, which included a clause expressly providing that “[t]here shall be no retroactive application of any portion of this Act.”<sup>137</sup> The final version of the bill, which actually passed, did not include said provision. Because this provision against retroactivity was not included in the final version of the bill, it may be presumed that Congress did not intend to preclude retroactivity of the FSA. “Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.”<sup>138</sup> The deletion of limiting language is exactly what

<sup>132</sup> *Id.* at 451-52.

<sup>133</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2335 (2012).

<sup>134</sup> *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010).

<sup>135</sup> 18 U.S.C.A. § 3582 (c)(2) (West 2002).

<sup>136</sup> *Dillon*, 130 S. Ct. at 2692.

<sup>137</sup> H.R. 265, 111th Cong. § 11 (2009).

<sup>138</sup> *Plata v. Schwarzenegger*, 603 F.3d 1088, 1096 (9th Cir. 2010) (quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983)); see also *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 100-01 (1993) (quoting *Russello*, applying it to rejection of Senate draft of bill, and stating “[w]e are directed by those words [in the final bill], and not by the discarded draft”); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (noting enactment of House bill rather than Senate bill and stating that “[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language”).



happened here; the earlier version of the bill expressly and broadly barred any retroactive application and the final version of the bill contained no limitation at all.

Just as was seen before *Dorsey*, the major hurdle to full retroactivity is the savings statute. While the *Dorsey* Court felt the saving statute did not alter their holding,<sup>139</sup> the clause has nonetheless been the critical factor in lower courts denying retroactivity, even post-*Dorsey*.<sup>140</sup> Thus, any defendant seeking retroactivity must still convince the court the general savings statute does not apply.

The general savings statute was enacted in 1871 in order to “abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of ‘all prosecutions which had not reached final disposition in the highest court authorized to review them.’”<sup>141</sup> Such abatements were “often the product of legislative inadvertence.”<sup>142</sup> The saving statute cannot be viewed narrowly, but its context must be considered in light of the statutes at issue. As the Supreme Court held in *Hertz v. Woodman*,<sup>143</sup> the saving statute is “to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress.”<sup>144</sup>

In *Bradley v. United States*,<sup>145</sup> the Supreme Court considered whether defendants convicted of drug offenses committed prior to the effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970 could benefit from that Act, or whether they were required to be sentenced according to the law in force at the time of the offenses even though their sentences were imposed after it. Following the savings statute, the Supreme Court noted that “[a]t common law, the repeal of a criminal statute abated all prosecutions that had not reached final disposition in the highest court authorized to review them.”<sup>146</sup> The rule applied even when the statute was not repealed, but the penalty reduced.<sup>147</sup> “To avoid such results, legislatures frequently indicated an intention not to abate pending prosecutions by including in the repealing statute a specific clause stating that prosecutions of offenses under the repealed statute were not to be abated.”<sup>148</sup> In *Bradley*, the Court considered such a saving clause that was included in the statute at issue and it held

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<sup>139</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012).

<sup>140</sup> *United States v. Hippolyte*, 712 F.3d 535, 542 (11th Cir. 2013); *United States v. Finley*, 487 F. App’x. 260, 264-65 (6th Cir. 2012).

<sup>141</sup> *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) (quoting *Bradley v. United States*, 410 U.S. 605, 606-07 (1973)).

<sup>142</sup> *Marrero*, 417 U.S. at 660; *Hamm v. Rock Hill*, 379 U.S. 306, 314-15 (1964).

<sup>143</sup> *Hertz v. Woodman*, 218 U.S. 205, 217 (1910).

<sup>144</sup> See also *United States v. Dixon*, 648 F.3d 195, 199 (3d Cir. 2011) (“Saving Statute cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.”); *United States v. Douglas*, 644 F.3d 39, 43 (1st Cir. 2011) (“[T]he savings statute may be overridden either by express declaration or necessary implication.”).

<sup>145</sup> *Bradley*, 410 U.S. at 606.

<sup>146</sup> *Id.* at 607.

<sup>147</sup> *Id.* at 608.

<sup>148</sup> *Id.*

that “prosecution” in that context meant “prosecution” as it was understood in its legal sense.<sup>149</sup> Thus, the district court in *Bradley* properly rejected the defendant’s argument that the statute’s ameliorative provisions should have been applied to them because they were sentenced after it went into effect.<sup>150</sup>

*Bradley*’s reliance on the savings clause should not control in determining the retroactivity of the FSA. Retroactively applying the FSA, either through a sentence reduction motion or a collateral attack, does not concern a pending prosecution and thus unlike *Bradley*, the general saving statute does not apply. Indeed, since a § 3582(c)(2) sentence reduction motion has a “limited scope and purpose,”<sup>151</sup> it “does not authorize a resentencing,” and is “within the narrow bounds established by the [Sentencing] Commission.”<sup>152</sup> Moreover, unlike the statute at issue in *Bradley*, the FSA does not contain a specific saving clause, and in fact the FSA does not expressly address retroactivity at all.

In looking at the congressional intent to determine the retroactivity of the FSA, a broader interpretation of the savings statute is necessary.<sup>153</sup> Such a broader view of the savings statute is essential because “the Saving Statute cannot control when preserving repealed penalties would plainly conflict with the intent of Congress as expressed in a subsequent statute.”<sup>154</sup> Even with statutory language that is “clearly delineated,” exceptions may be implied “where essential to prevent ‘absurd results’ or consequences obviously at a variance with the policy of the enactment as a whole.”<sup>155</sup> Accordingly, the savings clause should not be applied in circumstances that lead to an absurd result.

To prevent defendants sentenced under the now-repealed mandatory minimum sentencing penalties to attain retroactive relief of the FSA would yield absurd results. To require defendants to continue to languish under discriminatory and unfair sentencing provisions, would seriously undermine Congress’s intent in passing the FSA. Congress could not have been clearer in their purpose for passing the FSA, which was to “restore fairness in federal cocaine sentencing.”<sup>156</sup> Congress’s secondary purpose was to achieve consistency.<sup>157</sup> Neither fairness nor consistency can be achieved if countless defendants remain incarcerated under the pre-FSA statutory mandatory minimums. To effectuate the FSA’s objectives, the statute’s retroactivity cannot stop with pipeline defendants, but must apply to all defendants who are incarcerated for crack offenses.

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<sup>149</sup> *Id.* at 609.

<sup>150</sup> *Id.* at 609-10.

<sup>151</sup> *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010).

<sup>152</sup> *Id.* at 2694.

<sup>153</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

<sup>154</sup> *United States v. Dixon*, 648 F.3d 195, 199 (3d Cir. 2011).

<sup>155</sup> *United States v. Rutherford*, 442 U.S. 544, 552 (1979); *see also* *Bailey v. Lawrence*, 972 F.2d 1447, 1452 (7th Cir. 1992); *Sosa v. Jones*, 389 F.3d 644, 648 (6th Cir. 2004) (recognizing that it is “a traditional and appropriate function of the courts” to “construe statutes so as to avoid absurd results”).

<sup>156</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, pmb., 124 Stat. 2372, 2372 (2010)).

<sup>157</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372, 2374 (2010); *Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012).

Additionally, viewing the totality of events that led up to the FSA is an important consideration in determining retroactivity. With the goal of “restoring fairness,” the FSA is remedial in nature and is clearly intended to provide relief from what is now recognized as an unduly harsh and unjustified punishment. Principles of statutory construction support the retroactivity of the FSA because remedial legislation should be construed liberally.<sup>158</sup> While the FSA deals with penalty provisions, which are not traditionally viewed as remedial legislation, the FSA was unquestionably intended to remedy what has come to be viewed as unfair and unduly harsh sentencing.

Thus, principles of statutory construction, a fair reading of the FSA, and applying the rationale of the Supreme Court’s holding in *Dorsey* all point to the complete retroactivity of the FSA. Defendants who are currently serving sentences under the pre-FSA mandatory minimums should seek a sentence reduction under 18 U.S.C. § 3582(c)(2) as well as challenge the constitutionality of their sentence by a collateral attack, under 28 U.S.C. § 2255.

#### VI. HOW THOSE WHO CONTINUE TO LANGUISH IN PRISON UNDER THE PRE-FSA PENALTIES SEEK RETROACTIVE RELIEF

This Author suggests there are two viable ways in which a defendant could challenge the constitutionality of their sentence: (1) that failure to retroactively apply the FSA violates the Equal Protection Clause and (2) failure to retroactively apply the FSA constitutes cruel and unusual punishment. Each will be dealt with individually.

##### *A. Equal Protection of the Laws Requires Retroactive Application of the FSA*

Since *Dorsey* has been issued, only one court has granted relief to inmates seeking retroactive application of the FSA. On May 17, 2013, the Sixth Circuit issued *United States v. Blewett*.<sup>159</sup> In *Blewett*, the two defendants appealed the denial of their sentence reduction motion pursuant to 18 U.S.C. § 3582(c)(2).<sup>160</sup> The Sixth Circuit reversed and remanded, finding “the federal judicial perpetuation of the racially discriminatory mandatory minimum crack sentences for those defendants sentenced under the old crack sentencing law, as the government advocates, would violate the Equal Protection Clause, as incorporated into the Fifth Amendment by the doctrine of *Bolling v. Sharpe*, 347 U.S. 497 (1954).”<sup>161</sup> The Sixth Circuit also held the Supreme Court’s opinion in *Dorsey* confirmed that “Congress . . . intended the Fair Sentencing Act to repeal and redress the wrongs of the older crack statute that Congress believed had proven itself to be arbitrary, irrational, and racially discriminatory. The status quo has now been overturned.”<sup>162</sup>

The Court went on to say:

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<sup>158</sup> See *Landgraf*, 511 U.S. at 263 n.16 (“[R]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction.”); *Pierson v. Ray*, 386 U.S. 547, 561 n.1 (1999); *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1176 (9th Cir. 2010); *Smith v. Chater*, 99 F.3d 780, 781 (6th Cir. 1996).

<sup>159</sup> *United States v. Blewett*, 719 F.3d 482 (6th Cir. 2013).

<sup>160</sup> *Id.* at 485.

<sup>161</sup> *Id.* at 484.

<sup>162</sup> *Id.* at 486 (emphasis added).

The remedy is straightforward and relatively simple. The Fair Sentencing Act and the new retroactive Sentencing Guidelines subsequently adopted by the Sentencing Commission can and should be interpreted to replace retroactively the old, discriminatory mandatory minimums with the new, more lenient minimums. It is our duty under the constitutional-doubt canon of statutory construction. The Equal Protection Clause requires us to alter what Senator Leahy called ‘one of the most notorious symbols of racial discrimination in the modern criminal justice system’ and an ‘imbalance that . . . disparages the Constitution’s promise of equal treatment for all Americans.’ In light of our new knowledge about the racial discrimination inherent in the old law, inertia and judicial instinct to avoid change and maintain the status quo should no longer protect the old sentences.<sup>163</sup>

The *Blewett* Court recognized it faced a dire situation: “thousands of inmates, most black, languish in prison under the old, discredited [crack vs. powder] ratio.”<sup>164</sup> In examining the Fair Sentencing Act, the Court “regard[ed] as the most important consideration the clear congressional purpose to end the long, racially discriminatory sentences imposed in crack cocaine cases over the past twenty-five years.”<sup>165</sup> The Court stated:

In light of our new knowledge about the racial discrimination inherent in the old law, inertia and judicial instinct to avoid change and maintain the status quo should no longer protect the old sentences. We should not allow the government’s legalisms to undermine the purpose of the Fair Sentencing Act and its more lenient punishment system for crack cocaine.<sup>166</sup>

In summary, the Court held, “The [Fair Sentencing Act of 2010] should apply to all defendants, including those sentenced prior to its passage. We therefore reverse the judgment of the district court and remand for resentencing.”<sup>167</sup>

Less than two months after the Sixth Circuit’s opinion in *Blewett*, the Court granted *en banc* review.<sup>168</sup> The effect of granting *en banc* review vacates the panel’s opinion in *Blewett*.<sup>169</sup> The case was argued before the entire Sixth Circuit *en banc* on October 9th. Despite the uncertainty of *Blewett*’s future in the Sixth Circuit, as well as potentially the Supreme Court, the analysis of the *Blewett* panel regarding Equal Protection is sound and should be followed.

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<sup>163</sup> *Id.* at 490 (citations omitted).

<sup>164</sup> *Id.* at 484.

<sup>165</sup> *Id.* at 486.

<sup>166</sup> *Id.* at 490.

<sup>167</sup> *Id.* at 484.

<sup>168</sup> *Blewett*, 2013 U.S. App. LEXIS 15872 (6th Cir. July 11, 2013).

<sup>169</sup> See 6TH CIR. R. 35(b) (“A decision to grant rehearing *en banc* vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal.”).

The discriminatory impact of the racially-biased crack cocaine sentencing scheme, by itself, is not an Equal Protection violation. However, the passage of the FSA, coupled with the congressional intent for passage of the FSA, illustrates that maintaining the pre-FSA sentences for those incarcerated amounts to an Equal Protection violation. Thus, failing to retroactively apply the FSA violates the Equal Protection Clause.

The federal crack cocaine sentences have been extremely disproportionately applied to African-Americans. [Insert footnote "supra notes 35-37"] Courts, however, have rejected Equal Protection challenges, even when confronted with daunting and harsh statistics detailing that African-Americans are prosecuted for crack over ten times as often as whites.<sup>170</sup> While statistics demonstrating the discriminatory impact alone are unable to provide constitutional relief for those serving pre-FSA penalties, the passage of the FSA is an intervening event, which has a dramatic effect on the Equal Protection analysis. The statements from Congressional members who supported and passed the FSA is substantial evidence of the discriminatory impact as well as the irrationality of the pre-FSA penalties. Looking at the totality of the statistics of disparate impact and the words from the legislature, maintaining these discriminatory pre-FSA sentences constitutes an Equal Protection violation.

The Supreme Court has held that a statute, which is race-neutral on its face, but is applied in a way that it invidiously discriminates on the basis of race, may amount to an Equal Protection violation.<sup>171</sup> In fact, the racial impact of a law, rather than a discriminatory purpose, is a critical factor.<sup>172</sup> "Statistics showing racial or ethnic imbalance are probative . . . [because and] only because such imbalance is often a telltale sign of purposeful discrimination."<sup>173</sup> The Eighth Circuit has held, "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the challenged conduct bears more heavily upon one race than another."<sup>174</sup> The circuits have held that when the "natural, probable, and foreseeable result" of a state action is racially motivated, a presumption of discriminatory intent can occur.<sup>175</sup>

<sup>170</sup> See, e.g., *United States v. Stevens*, 19 F.3d 93, 96 (2d Cir. 1994); *United States v. Washington*, 127 F.3d 510, 519 (6th Cir. 1997); *United States v. Dumas*, 64 F.3d 1427, 1429 (9th Cir. 1995); *United States v. Galloway*, 951 F.2d 64, 65 (5th Cir. 1992); *United States v. Lattimore*, 974 F.2d 971, 975 (8th Cir. 1992).

<sup>171</sup> *Washington v. Davis*, 426 U.S. 229, 241 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>172</sup> *Washington*, 426 U.S. at 243 (citing *Wright v. Council of Emporia*, 407 U.S. 451 (1972)); see also *id.* at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.").

<sup>173</sup> *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977); see also *Black Shield Police Ass'n v. Cleveland*, No. C85-1954, 1986 WL 532 at \*6 (N.D. Ohio Nov. 5, 1986) ("An inference of discriminatory purpose may arise from the historical background or from statistics showing the disparate impact.").

<sup>174</sup> *Inmates of Neb. Penal & Corr. Complex v. Greenholtz*, 567 F.2d 1368, 1375 (8th Cir. 1977) (citing *Washington*, 426 U.S. at 242).

<sup>175</sup> *NAACP v. Lansing Bd. of Ed.*, 559 F.2d 1042, 1046-47 (6th Cir. 1977); *United States v. Sch. Dist. of Omaha*, 521 F.2d 530, 535-36 (8th Cir. 1975), *vacated on other grounds*, 433

Thus, the statistics are probative, but not the sole touchstone, in determining whether the disproportionate application of the crack laws constitutes an Equal Protection violation.<sup>176</sup> Regarding these statistics, the Sentencing Commission reported that in 2011, eighty-three percent of federal crack cocaine defendants were African-American.<sup>177</sup> Additionally, from 1988 to 1995, federal prosecutors prosecuted no whites under the crack provisions in seventeen states, including major cities such as: Boston, Denver, Chicago, Miami, Dallas, and Los Angeles.<sup>178</sup> Thus, the pre-FSA sentencing statute has been disparately applied and has resulted in a significantly high proportion of African-Americans being sentenced. The Second Circuit even noted in 2011 the “retroactive [Guidelines] amendments exist to allow inequities to be fixed and the now-infamous 100-to-1 ratio was the source of shameful inequalities.”<sup>179</sup>

To buttress these statistics, members of Congress who supported the passage of the FSA have recognized the discriminatory impact of the pre-FSA sentencing scheme. On October 15, 2009, Senator Dick Durbin stated: “It is important to note that the crack/powder disparity disproportionately affects African Americans. . . . There is widespread and growing agreement that the Federal cocaine and sentencing policy in the United States today is unjustified and unjust.”<sup>180</sup> Senator Leahy stated, “These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under law . . . . The racial imbalance that has resulted from the cocaine sentencing disparity disparages the Constitution’s promise of equal treatment for all Americans.”<sup>181</sup> Representative Lee stated, “This disparity made no sense when it was initially enacted, and makes absolutely no sense today. . . . The unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts federal resources from high-level drug traffickers, but it also disproportionately affects the African-American community.”<sup>182</sup> Finally, Representative Lundgren declared:

We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn’t really have an evidentiary basis for it, but that’s what we did, thinking we were doing the right thing at the time. Certainly, one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial

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U.S. 667 (1977) (per curiam); *Hart v. Cmty. Sch. Bd. of Ed.*, 512 F.2d 37, 50-51 (2d Cir. 1975); *Morgan v. Kerrigan*, 509 F.2d 580, 588-89 (1st Cir. 1974).

<sup>176</sup> *Washington*, 426 U.S. at 242.

<sup>177</sup> U.S. SENT’G COMM’N, 2011 SOURCEBOOK, *supra* note 35, at tbl.34.

<sup>178</sup> *Weikel*, *supra* note 36; *United States v. Blewett*, 719 F.3d 482, 487 (6th Cir. 2013).

<sup>179</sup> *United States v. Rivera*, 662 F.3d 166, 176 (2d Cir. 2011).

<sup>180</sup> 155 CONG. REC. S10491 (daily ed. Oct. 15, 2009).

<sup>181</sup> 156 CONG. REC. S1682-83 (daily ed. Mar. 17, 2010).

<sup>182</sup> 156 CONG. REC. H6199 (daily ed. July 28, 2010).

sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue.<sup>183</sup>

These members of Congress, along with the President, ushered the FSA into law. As evidenced from the Congressional members quoted above, the FSA represented a systematic shift to get rid of the discriminatory impact of the crack cocaine sentencing scheme. Such intent from Congress, coupled with the statistics demonstrating the discriminatory impact, is a powerful combination. While the FSA meant to put such discriminatory impact behind us, those who remain in prison, and fail to receive retroactive benefit of the FSA, are still victims of this discrimination. For those inmates to remain in prison under these now-eroded discriminatory sentences, perpetuates the discrimination. By maintaining such discrimination, and failing to retroactively apply the FSA, the Equal Protection rights are being violated for those who remain in prison under the pre-FSA sentences.<sup>184</sup>

Furthermore, to apply the FSA to defendants like Dorsey, whose crimes preceded August 3, 2010, but not to those who were sentenced before August 3, 2010, is an irrational and arbitrary place for courts to draw the line. Such an arbitrary and unjust distinction also violates the Equal Protection Clause.<sup>185</sup>

*B. Failure to Retroactively Apply the FSA Constitutes Cruel and Unusual Punishment*

Failure to retroactively apply the FSA also violates a defendant's Eighth Amendment right against cruel and unusual punishment. A slew of Supreme Court cases, from the 1950s through the present, have held a defendant's sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment if it is contrary to the "national consensus and evolving standards of decency." The statutory changes in the FSA, changes to the federal sentencing guidelines, as well as state sentencing reforms regarding crack cocaine, represent a systematic and widespread shift how crack cocaine offenders should be sentenced as compared to powder cocaine offenders. Taken together, the reforms in sentencing represent an evolution in the standards of decency. Thus, any defendant still subject to pre-FSA penalties is serving a cruel and unusual punishment.

For generations, the Supreme Court has been guided by the "national consensus" and "evolving standards of decency" in deciding whether a sentencing scheme constitutes cruel and unusual punishment. In *Trop v. Dulles*,<sup>186</sup> the Supreme Court declared a sentence unconstitutional because it offended our nation's "standards of decency." In *Trop*, the petitioner was convicted by military court of desertion during wartime and sentenced to loss of American citizenship.<sup>187</sup> *Trop* filed for declaratory

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<sup>183</sup> 156 CONG. REC. H6202 (daily ed. July 28, 2010).

<sup>184</sup> Cf. *Clarke v. City of Cincinnati*, No. C-1-92-278, 1993 WL 761489 at \*20 (S.D. Ohio July 8, 1993), *aff'd*, 40 F.3d 807 (6th Cir. 1994) (in a case finding the local electoral system violated the Equal Protection Clause, held that even though the state action was not adopted with a discriminatory intent, maintaining such a system was still unconstitutional).

<sup>185</sup> *Chapman v. United States*, 500 U.S. 453, 464-65 (1991); *Jones v. United States*, 463 U.S. 354, 362 n.10 (1983).

<sup>186</sup> *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion).

<sup>187</sup> *Id.* at 88.

judgment claiming to be a citizen.<sup>188</sup> The Supreme Court held the Eighth Amendment's prohibition on cruel and unusual punishment "forbids Congress to punish by taking away citizenship," and struck down Trop's sentence.<sup>189</sup> The Court declared:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.<sup>190</sup>

"The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. . . . This punishment is offensive to the cardinal principles for which the Constitution stands."<sup>191</sup>

The Court, looking to other nations, stated that denationalization is highly disfavored.<sup>192</sup> "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime . . . The United Nations' survey of the nationality laws of eighty-four nations of the world reveals that only two countries . . . impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done."<sup>193</sup> Therefore, the Supreme Court set a precedent of looking at "standards of decency" in evaluating whether a punishment violates the Eighth Amendment.<sup>194</sup>

The next time the Supreme Court used such a standard was in *Estelle v. Gamble*.<sup>195</sup> In *Estelle*, a state prisoner filed a civil rights action against prison officials for failure to provide medical care.<sup>196</sup> The Supreme Court held deliberate indifference to a prisoner's serious illness or injury constitutes cruel and punishment.<sup>197</sup> The Court stated the Eighth Amendment prevents more than physically barbarous punishments, but also "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . . ."<sup>198</sup> "Thus, we have held

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 103.

<sup>190</sup> *Id.* at 99-100 (citation omitted).

<sup>191</sup> *Id.* at 101-02.

<sup>192</sup> *Id.* at 102-03.

<sup>193</sup> *Id.* at 102-03 (footnotes omitted).

<sup>194</sup> *See id.*

<sup>195</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>196</sup> *Id.* at 98.

<sup>197</sup> *Id.* at 104.

<sup>198</sup> *Id.* at 102 (citations omitted).



repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”<sup>199</sup>

In 1988, the Supreme Court held Oklahoma’s statute allowing execution of children under age sixteen constituted cruel and unusual punishment.<sup>200</sup> In *Thompson v. Oklahoma*, the Court held executing children under age sixteen would “offend civilized standards of decency.”<sup>201</sup> The Court, in discussing its duty to re-evaluate whether legislative decisions violate the standards of decency, stated:

There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. . . . The world changes in which unchanging values find their application.

. . . .  
We must never hesitate to apply old values to new circumstances. . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.<sup>202</sup>

The Court held that standards of decency prevent execution of a child under age sixteen, citing to the laws of a dozen other countries, the American Bar Association, and the American Law Institute.<sup>203</sup>

In *Atkins v. Virginia*,<sup>204</sup> the Supreme Court held imposition of the death penalty for those suffering from mental retardation violated prevailing standards of decency. In holding that the Eighth Amendment forbids the death penalty for those suffering from mental retardation, the Court held such a punishment is excessive, stating:

A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the “Bloody Assizes” or when the Bill of Rights was adopted, but rather by those that currently prevail. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.<sup>205</sup>

In evaluating whether a sentence violates the standards of decency for a maturing society, the Court looked at state’s recent legislative enactments on executing those suffering from mental retardation.<sup>206</sup> The Court stated in the preceding sixteen years (from 1986 through 2002), nineteen different states passed legislation forbidding the

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<sup>199</sup> *Id.* at 103 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Trop*, 356 U.S. at 100-01; *Weems v. United States*, 217 U.S. 349, 373 (1910)).

<sup>200</sup> *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

<sup>201</sup> *Id.* at 830.

<sup>202</sup> *Id.* at 830 n.4.

<sup>203</sup> *Id.* at 830-31.

<sup>204</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>205</sup> *Id.* at 311-12 (citations omitted).

<sup>206</sup> *Id.* at 314.

execution of those with mental retardation.<sup>207</sup> Even in the states that had not passed such legislation, the practice of executing those with mental retardation was uncommon.<sup>208</sup> The Court stated, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal . . . and it is fair to say that a national consensus has developed against it.”<sup>209</sup> The Court declared in, “[c]onstruing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we . . . conclude that such punishment is excessive.”<sup>210</sup>

Three years after *Atkins*, the Supreme Court held in *Roper v. Simmons*,<sup>211</sup> the national consensus supported a categorical ban on imposing the death penalty for individuals under 18 at the time of their crime. The Court stated:

The prohibition against “cruel and unusual punishments,” like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual.<sup>212</sup>

Following its methodology from *Atkins*, the *Roper* Court acknowledged there are thirty states prohibiting the death penalty for juveniles, twelve of which have abandoned the death penalty altogether, and eighteen expressly exclude juveniles.<sup>213</sup> Furthermore, of the twenty states allowing execution of juveniles, only six states had executed juveniles since 1989 and only three states since 1995.<sup>214</sup> The Court also noted that the United States is one of eight countries in the world to execute a juvenile in the previous fifteen years.<sup>215</sup> The Court concluded that an objective consensus exists against the juvenile death penalty among the States, an infrequency of its use even where it remains on the books, and consistency toward abolition of the practice.<sup>216</sup> Therefore, the Court held the execution of any juvenile violated the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>217</sup>

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<sup>207</sup> *Id.* at 314-15.

<sup>208</sup> *Id.* at 316.

<sup>209</sup> *Id.* at 315-16.

<sup>210</sup> *Id.* at 321.

<sup>211</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>212</sup> *Id.* at 560-61 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

<sup>213</sup> *Id.* at 564.

<sup>214</sup> *Id.* at 564-65.

<sup>215</sup> *Id.* at 577.

<sup>216</sup> *Id.* at 567.

<sup>217</sup> *Id.* at 578.

In 2008, the Supreme Court held the Eighth Amendment also prohibited the death penalty for rape that did not result in the death of the victim. *Kennedy v. Louisiana*.<sup>218</sup> In forbidding imposition of the death penalty for a non-homicide crime under the Eighth Amendment, the Court stated, whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that “currently prevail.”<sup>219</sup> This is because “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”<sup>220</sup>

In *Graham v. Florida*,<sup>221</sup> the Supreme Court held the prohibition on cruel and unusual punishment is violated by sentencing a juvenile to life in prison without parole for a non-homicide crime. In *Graham*, a juvenile defendant, was convicted of burglary and sentenced to life in prison without the possibility of parole.<sup>222</sup> The Supreme Court vacated his conviction and remanded the case based on Eighth Amendment jurisprudence.<sup>223</sup> Justice Kennedy held, “to determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.”<sup>224</sup>

To determine the national consensus, the Court said it must begin with objective indicia.<sup>225</sup> “[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.”<sup>226</sup> However, the Court found legislation alone to be deficient on the issue, and chose to look at “actual sentencing practices [for] the Court’s inquiry into consensus.”<sup>227</sup> The Court found sentences of life without parole for juvenile non-homicide offenders, are infrequent.<sup>228</sup>

The Court stated an inquiry on national consensus must also consider whether the sentencing practice at issue serves legitimate penological goals.<sup>229</sup> The Court went on to say “[w]ith respect to life without parole for juvenile non-homicide offenders, none of the goals of penal sanctions recognized as legitimate – retribution, deterrence, incapacitation, and rehabilitation – provide an adequate justification.”<sup>230</sup>

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<sup>218</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>219</sup> *Id.* at 419 (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)).

<sup>220</sup> *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)).

<sup>221</sup> *Graham v. Florida*, 130 S. Ct. 2011 (2010).

<sup>222</sup> *Id.* at 2018-19.

<sup>223</sup> *Id.* at 2034.

<sup>224</sup> *Id.* at 2021 (internal quotation marks and citations omitted).

<sup>225</sup> *Id.* at 2022.

<sup>226</sup> *Id.* at 2023 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 2026 (citing *Kennedy v. Louisiana*, 554 U.S. 407, 437-38 (2008); *Roper v. Simmons*, 543 U.S. 551, 572 (2005); *Atkins*, 536 U.S. at 318-20).

<sup>230</sup> *Id.* at 2028.

Therefore, the Court struck down life without parole sentences for juveniles convicted of a non-homicide crime, as such a sentence violates the national consensus and evolving standards of decency.

As indicated by the Supreme Court's holdings, detailed above, a sentence can violate the Eighth Amendment if it violates the national consensus or evolving standards of decency. Our national consensus and standards of decency are not stagnant, but are fluid and ever-changing concepts. To properly evaluate this threshold, the constitutionality of a sentence must be considered through current norms and values, not what our Founding Fathers may have done. To make such an assessment, the Supreme Court has looked to: sentencing practices of other countries<sup>231</sup>, legislative reforms by the states<sup>232</sup>, sentencing statistics<sup>233</sup>, and sentencing practices throughout the country.<sup>234</sup> The Supreme Court has not placed any limits on what a court can consider in evaluating whether a sentence violates our national consensus or evolving standards of decency. In following these standards, failure to retroactively apply the FSA offends the national consensus and evolving standards of decency and therefore violates the Eighth Amendment.

As detailed above, the Anti-Drug Abuse Act of 1986 created the sentencing disparity between crack and powder cocaine. For twenty years, this disparity remained unchanged, but in 2007, the Sentencing Commission passed U.S.S.G. Amendment 706, which lowered base offense levels for crack cocaine offenses.<sup>235</sup> Soon after the passage of Amendment 706, the Supreme Court criticized the sentencing disparity between crack and powder cocaine in *Spears v. United States*.<sup>236</sup> In *Spears*, the Supreme Court held that district courts have the authority to reject the one hundred to one ratio altogether and replace it with a ratio the district court believes to be more accurate.<sup>237</sup> After the Court's holding in *Spears*, a number of federal courts rejected the crack-to-powder cocaine sentencing disparity and imposed an equal (or one to one) ratio in sentencing crack offenders.<sup>238</sup> Soon thereafter the

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<sup>231</sup> *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988).

<sup>232</sup> *Atkins*, 536 U.S. at 314-15; *Roper*, 543 U.S. at 564-65.

<sup>233</sup> *Graham*, 130 S. Ct. at 2023.

<sup>234</sup> *Atkins*, 536 U.S. at 314-15.

<sup>235</sup> U.S. SENTENCING GUIDELINES AMENDMENT 706 (effective Nov. 1, 2007).

<sup>236</sup> *Spears v. United States*, 555 U.S. 261 (2009).

<sup>237</sup> *Id.* at 265.

<sup>238</sup> See, e.g., *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009) (rejecting the sentencing guideline range of 108 to 135 months and imposing a sentence of 84 months under the 1:1 ratio); *United States v. Lewis*, 623 F. Supp. 2d 42 (D.D.C. 2009) (imposing 130 month sentence under 1:1 ratio); Sentencing Memorandum & Order at 3, *United States v. Terry*, No. 5:09-CR-0013 (N.D. Ohio Oct. 8, 2009) (Wells, J., imposing a sentence consistent with the 1:1 ratio of 18 months imprisonment); *United States v. Griffin*, No. 5:09-CR-008 (N.D. Ohio, July 15, 2009) (Gwin, J., imposing a sentence consistent with the 1:1 ratio of 33 months; the sentencing guideline was initially 70-87 months); *United States v. Henderson*, 660 F. Supp. 2d 751 (E.D. La. 2009); *United States v. Golden*, 679 F. Supp. 2d 980 (N.D. Iowa 2010); *United States v. Greer*, 699 F. Supp. 2d 876 (E.D. Tex. 2010).

FSA was passed by Congress and signed by the President; then the Sentencing Commission further reduced the crack cocaine sentencing guidelines.<sup>239</sup>

Therefore, even though the disparity between crack and powder cocaine has existed since the mid-1980s, significant erosion in the disparity between crack and powder cocaine has occurred in the last six years. Such drastic changes, endorsed by the Judiciary, Legislative, and Executive branches, represent a shift in the national consensus as to the severity of the crack cocaine penalties as compared to powder cocaine penalties.

On September 18, 2013, the United States Sentencing Commission unanimously recommended to the Senate Judiciary Committee that the FSA be made retroactive.<sup>240</sup> The Sentencing Commission is a bi-partisan seven-member group of federal judges who submit reports to Congress regarding the federal Sentencing Guidelines.<sup>241</sup> In this report, the Commission submitted a report to the Senate Judiciary Committee on the impact of all mandatory minimums in federal sentencing.<sup>242</sup> Included in this report was a unanimous recommendation the FSA be made retroactive.<sup>243</sup> The Sentencing Commission detailed their previous efforts to conform the Sentencing Guidelines to the FSA's new mandatory minimums, by passing U.S.S.G. Amendment 750.<sup>244</sup> Commission also stated retroactive application of the FSA was consistent with the guideline amendments, as both served to "restor[e] fairness and reduc[e] disparities."<sup>245</sup> The Commission noted that retroactive application of the FSA would result in reductions for 8,829 inmates, with an average reduction of 53 months per inmate.<sup>246</sup> Furthermore, of those potentially-eligible, 87.7% are African-American.<sup>247</sup>

Even the states have criticized their own legislative disparities between crack and powder cocaine. Ohio's legislature has taken significant steps to reduce the disparity between crack and powder cocaine sentences. On June 29, 2011, Ohio Governor Kasich signed House Bill 86 into law, which completely eliminates Ohio's sentencing disparity between crack and powder cocaine.<sup>248</sup> On March 31, 2010, the South Carolina Senate approved sweeping reforms to its drug laws, reducing mandatory minimum sentences for first-time drug offenders, and eliminated sentencing disparities between crack and powder cocaine possession.<sup>249</sup> Connecticut,

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<sup>239</sup> U.S. SENTENCING GUIDELINES AMENDMENT 750 (effective Nov. 1, 2011).

<sup>240</sup> U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 1.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 9-10.

<sup>244</sup> *Id.* at 9; U.S. SENTENCING GUIDELINES AMENDMENT 750 (effective Nov. 1, 2011).

<sup>245</sup> U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 9.

<sup>246</sup> *Id.* at 10.

<sup>247</sup> *Id.*

<sup>248</sup> Amend. Sub. H.B. 86, 129th Gen. Assemb. (Ohio 2011).

<sup>249</sup> Chris Haire, *SC Senate Passes Sentencing Reform Bill that Would Decrease Non-Violent Prison Population*, CHARLESTON CITY PAPER, Mar. 31, 2010, <http://www.charlestoncitypaper.com/HaireoftheDog/archives/2010/03/31/sc-senate-passes-crime-reform-bill-decreases-non-violent-prison-population>.

in 2005, passed Bill 6975, which ended the state's disparity between crack and powder cocaine.<sup>250</sup> Connecticut's sentencing laws now apply to crack and powder cocaine equally; previously a conviction for selling half a gram of crack cocaine resulted in the same five-year sentence as twenty-eight grams of powder cocaine.<sup>251</sup> The state of Missouri had the largest crack to powder sentencing disparity among the states; in 2012, the Missouri legislature significantly reduced the disparity.<sup>252</sup> Iowa previously had a one hundred to one crack to powder sentencing ratio, but in 2007 reduced the disparity to ten to one.<sup>253</sup> In total, of the thirteen states which had a sentencing disparity between crack and powder cocaine, nearly all had reduced this disparity by 2007.<sup>254</sup>

These legislative changes reducing or eliminating the disparity between crack and powder cocaine at both the state and federal levels represent comprehensive and widespread change in the national consensus as to how our society views crack cocaine sentences. The erosion of the disparity between crack and powder cocaine represents that the punishments under 21 U.S.C. § 841 are now considered too harsh, and new standards have emerged in society. Therefore, failure to retroactively apply the FSA, and thereby maintaining the old discriminatory crack cocaine sentences, now offends the national consensus and violates the Eighth Amendment.

#### VII. POLICY REASONS WHY THE FAIR SENTENCING ACT SHOULD BE RETROACTIVE

As an attorney with the Office of the Federal Defender, this Author advocates for retroactivity of the FSA on behalf of his clients, as he currently represents clients who will receive a significant sentence reduction if the FSA were retroactively applied. He has multiple clients in the same position as Andre, mentioned earlier in our article, serving mandatory sentences under the pre-FSA penalties—some are even serving life sentences. As a citizen, not as an attorney representing his clients, there are significant reasons why the FSA should be retroactive. Obviously, there are arguments for equality, fairness, and a just result, but more tangibly, there are financial incentives for retroactivity of the FSA. Retroactively applying the FSA will literally save our country *billions* of dollars.

There are currently two hundred and eleven thousand people in Bureau of Prisons facilities.<sup>255</sup> For the fiscal year 2013 budget, the Department of Justice has

<sup>250</sup> Sub. H.B. 6975, 2005 Sess. (Conn. 2005), *available at* <http://www.cga.ct.gov/2005/ACT/Pa/pdf/2005PA-00248-R00HB-06975-PA.pdf>.

<sup>251</sup> *Id.*

<sup>252</sup> Associated Press, *Mo. Lawmakers Trim Disparity in Drug Sentences*, KSHB.COM, May 18, 2012, <http://www.kshb.com/dpp/news/state/missouri/mo-lawmakers-trim-disparity-in-drug-sentences>.

<sup>253</sup> U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 98-99 (May 2007).

<sup>254</sup> *Id.* at 104-07.

<sup>255</sup> *Quick Facts about the Bureau of Prisons*, FED. BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last updated Oct. 26, 2013); U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 5.

requested that \$8.6 billion go towards the Bureau of Prisons.<sup>256</sup> About fifteen percent of all federal prisoners—about thirty thousand people—are serving sentences for crack cocaine offenses.<sup>257</sup> About eighty-three percent of federal prisoners serving crack cocaine sentences are African-American.<sup>258</sup> Thousands of these prisoners are incarcerated for life or for twenty, ten, or five years under mandatory minimum crack cocaine sentences imposed prior to the passage of the Fair Sentencing Act.<sup>259</sup> In fact, between January and August of 2010—before the passage of the FSA—nearly four thousand defendants received mandatory minimum sentences for crack cocaine.<sup>260</sup> The cost of housing a healthy inmate in 2011 was \$2,407.78 per month, or \$28,893.36 per year.<sup>261</sup>

Thus, our federal prisons continue to house, and ultimately pay for, thousands of inmates who are serving sentences, which Congress has deemed to be unfair through its enactment of the FSA. This is an exorbitant waste of our tax dollars. Retroactive application of the FSA will ease this unnecessary fiscal strain.

To put things into perspective, let us look at the Northern District of Ohio. In the Northern District of Ohio alone, there are currently about five hundred inmates currently serving time in federal prison for pre-FSA crack cocaine offenses.<sup>262</sup> Due to the passage of the retroactive sentencing guideline amendment, U.S.S.G. Amendment 750, the Office of the Federal Defender was appointed to represent all five hundred inmates for potential sentence reduction motions, pursuant to 18 U.S.C. § 3582(c)(2).<sup>263</sup> In evaluating those potentially eligible, the Office of the Federal Defender has investigated and detailed all the relevant information from each defendant's original sentencing hearing. As a result, the Office of the Federal Defender for the Northern District of Ohio has filed one hundred and fifty-three motions on behalf of those who are eligible for a sentence reduction under 18 U.S.C.

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<sup>256</sup> U.S. DEP'T OF JUSTICE, FY 2013 BUDGET REQUEST: PRISONS AND DETENTION 1, available at <http://www.justice.gov/jmd/2013factsheets/prison-detention.pdf>; U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 2, 6.

<sup>257</sup> *United States v. Blewett*, 719 F.3d 482, 485 (6th Cir. 2013); U.S. SENT'G COMM'N, ANALYSIS OF THE IMPACT OF GUIDELINE IMPLEMENTATION OF THE FAIR SENTENCING ACT OF 2010 IF THE AMENDMENT WERE APPLIED RETROACTIVELY 12 (May 20, 2011) [hereinafter U.S. SENT'G COMM'N, ANALYSIS OF IMPACT].

<sup>258</sup> *Id.*; U.S. SENT'G COMM'N, STATEMENT OF JUDGE SARIS, *supra* note 34, at 10.

<sup>259</sup> U.S. SENT'G COMM'N, ANALYSIS OF IMPACT, *supra* note 257, at tbl.1.

<sup>260</sup> *Blewett*, 719 F.3d at 489; U.S. SENT'G COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.43 (2010), available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/sbtoc10.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/sbtoc10.htm).

<sup>261</sup> Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 52 (Mar. 18, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-03-18/html/2013-06139.htm>.

<sup>262</sup> Brief for Office of the Federal Defender for the Northern District of Ohio as Amicus Curiae at 3, *Blewett*, 2013 U.S. App. LEXIS 15872 (6th Cir. July 11, 2013) (Nos. 12-5226, 12-5582) [hereinafter Federal Defender as Amicus Curiae].

<sup>263</sup> Appointing the Office of the Federal Public Defender, Order No. 2011-24 (N.D. Ohio Oct. 4, 2011), available at [http://www.ohnd.uscourts.gov/assets/Rules\\_and\\_Orders/General\\_Orders/2011-24.pdf](http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/General_Orders/2011-24.pdf).

§ 3582(c)(2).<sup>264</sup> Of these, eighty-two motions have been granted and dozens are still pending before either district courts or on appeal to the Sixth Circuit Court of Appeals.<sup>265</sup> The granted motions have resulted in an aggregate reduction of two thousand one hundred and ninety-five months of prison time.<sup>266</sup> As the monthly cost to incarcerate someone in the Bureau of Prisons is \$2,407.78 (on average for a healthy individual), these motions have saved the federal government approximately \$5.3 million in the Northern District of Ohio alone.

Many of these eighty-two defendants who have had motions granted were only able to receive a reduction to the pre-FSA mandatory and were unable to receive sentences below the mandatory minimum even though the FSA now exists. Additionally, there remain approximately two hundred and fifty other inmates who were unable to get any reduction as their sentence hinged on the pre-FSA mandatory minimum sentence. The cost savings in retroactively applying the FSA to these inmates is astounding. This author has gone through each and every of the five hundred inmates serving crack cocaine sentences. For each one, this author has calculated the new sentencing guidelines if the FSA's statutory penalties were retroactively applied to their sentences; all other aspects of their original sentencing remain in place. Approximately three hundred of the defendants would be eligible for some reduction. Assuming each defendant received a sentence at the low-end of their new guideline range, the result would be an aggregate reduction of 15,915 months in prison, which averages out to about fifty-three months per eligible inmate.<sup>267</sup> This collective reduction equates to over \$38 million in savings for the Bureau of Prisons' budget. These tremendous savings would be associated with those three hundred inmates from the Northern District of Ohio alone. Given the fact that there are ninety-three federal districts, the savings nationwide for this minor change in the law would be billions of federal dollars.

Moreover, this retroactive application is not a hand-out or a technicality conferred upon these inmates, it would merely be applying the current law to their sentences. Consistent with the FSA, such an initiative would be fair, not just to those serving prison sentences, but also fair to the American taxpayer. There is no reason why tax dollars should go to continue to incarcerate inmates serving unnecessarily long sentences, which Congress has determined to be unfair and discriminatory.

#### VIII. CONCLUSION

The passage of the Fair Sentencing Act of 2010 was a significant event for all defendants sentenced for crack cocaine offenses. The Act itself, as well as the litigation that has followed, has given rise to an opportunity for these defendants to seek relief. For both the precedent and policy reasons detailed above, the FSA should be made retroactive. Doing so will allow defendants like Andre to receive a fair and just sentence, which was the reason the FSA was passed in the first place.

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<sup>264</sup> Federal Defender as Amicus Curiae, *supra* note 262.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> For purposes of calculation, a defendant serving a life sentence was designated a term of four hundred months.